(3)

No. 05-1525

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

NILO D. TUAZON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether product sales and sales-related activities in the forum state can constitute sufficient minimum contacts to support the exercise of general jurisdiction over a company incorporated and headquartered elsewhere, and thus allow suit on claims having no connection to the forum.

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The Petition for Certiorari demonstrated that there is a substantial disagreement among the circuits with regard to how to determine the sufficiency of minimum contacts to support general jurisdiction. It showed further that this difference in approach has, since this Court's last decision on the subject in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), resulted in a series of decisions from at least nine circuits, and from many states, which sharply divide on the question whether product sales and related activities can suffice to support general jurisdiction.

In addition, the Petition demonstrated that the constitutional due process issue at hand, on its face a question of fair play and substantial justice, also directly implicates important issues of federalism and forum shopping. And it has become a font of extensive wasteful litigation about whether a case is in the right court, which can only be significantly reduced by this Court's clarification of the proper approach to the issue.

Respondent does not dispute the importance of the issue at hand; its recurrent nature; its close relationship to fundamental questions of fairness, federalism and forum shopping; or that questions of general jurisdiction have become a subject of frequent, extended, wasteful litigation. Indeed, he appears to "assum[e] some need to clarify aspects of the law of general jurisdiction." Opp. at 19. But he urges the Court to deny certiorari for two reasons.

First, he asserts, without basis, that the issue framed in the Question Presented was not raised in or decided by the Court below. Second, as to the circuit conflict, he asserts that the cases relied on by Petitioner can all be reconciled on their facts, and that "these cases all take the same basic approach as the decision below, . . . weigh[ing] the various contacts . . . and compar[ing] them to the contacts in prior cases." *Id.* at 9. In essence, he echoes the reasoning of the court below, in viewing this Court's decisions in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros* as "bookends," with space between them that must be "filled

in" by unstructured, "case-by-case review." Opp. at 13 (quoting Pet. App. 14a n.3).

But the circuit cases are not reconcilable on their facts. And the undeniably divergent results flow directly from a fundamental difference in approach to the analysis. As demonstrated in the Petition and below, a growing number of circuits now view general jurisdiction as turning on a largely quantitative assessment of undifferentiated facts, with the result that companies selling large quantities of products may well be susceptible to general jurisdiction everywhere their products are sold. This is sharply at odds with the more traditional approach, which focuses more on the quality than the quantity of contacts, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945), and recognizes that general business contacts akin to those present in *Perkins* must exist to assert jurisdiction over claims unrelated to those activities.

For these reasons, as demonstrated further below, this Court should grant certiorari to resolve the question presented, and to clarify which of the two now-competing approaches to analyzing minimum contacts for general jurisdiction is embodied in the due process clause.

I. The Circuits Are Widely Split on How to Assess Minimum Contacts Necessary For General Jurisdiction, and Thus on Whether Sales-Related Contacts Can Suffice

In discussing the appellate precedents, Respondent asserts that "the only thing that accounts for the different outcomes in these cases is their very different facts," and that cases finding a lack of jurisdiction merely "represent one end of a continuum," with the appellate courts conducting harmonious analyses of differing fact patterns. Opp. at 8-9. This characterization is clearly inaccurate. For example, the Fifth Circuit found general jurisdiction lacking where hundreds of millions of dollars of the defendant's products flowed into the forum state, aided by a network of seventeen independent in-forum distributors including a wholly owned subsidiary, and where the defendant "purchased over $195 million of goods and services from over 500 [forum state]

vendors." *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372-73 (5th Cir. 1987). By contrast, the Second Circuit, viewing *Bearry* and the decisions of two other Courts of Appeals as not "particularly persuasive," found general jurisdiction on the basis of $4 million in sales over 6 years, relationships with independent distributors and contractors, and related sales support. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 571-73 (2d Cir. 1996).

Even when focusing only on the facts presented and the result reached, the circuit split is wide and clear. The decisions of the First, Fourth, Fifth and Eleventh Circuits take a limited approach to general jurisdiction, and find sales and sales-related contacts with the forum state to be insufficient minimum contacts for general jurisdiction.[1] On the other hand, the Federal, Second, Sixth, and Eighth Circuits have adopted a more expansive approach to general jurisdiction, under which similar sales-related contacts were found sufficient to support general jurisdiction.[2]

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[1] For example, the following decisions found no general jurisdiction: *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198 (4th Cir. 1993) (annual sales of $9–13 million in the forum, promoted by 17-21 employees working there, 13 of whom lived in the forum, and advertising in local papers); *Bearry*, 818 F.2d at 372 (forum sales of aircraft and airframe assemblies amounting to more than $300 million over a five year period, through a network of 17 independent distributors, promoted by nationwide advertising); *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215 (1st Cir. 1984) (eight sales representatives, limited advertising and substantial sales of pharmaceutical products through wholesale distributors in forum state); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 746 (4th Cir. 1971) (authority to do business, appointed agent for service of process, and five "detail men" promoting sale of drugs who were resident in forum); *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 585 (1st Cir. 1970) ("some half dozen New Hampshire salesmen, most of whom are New Hampshire residents"). .

[2] *E.g.*, *LSI Indus. Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1370 (Fed. Cir. 2000) ("employs multiple distributors in Ohio and nets several millions of dollars per year from sales" there); *Metropolitan Life Ins. Co.*, 84 F.3d at 565-66 ("five [independent] Vermont dealers" and four "authorized builders" selling $4 million worth of products over six years); *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (one "independent sales representative" and 400 total sales of

Thus, there can be no doubt about the existence of significantly divergent outcomes among the courts of appeals – that cases decided in several circuits would come out differently on the issue of the existence of minimum contacts if they were decided in certain other circuits. But this is no mere fact-specific split, in which courts applying the same legal standard or rule simply reach divergent outcomes by mistake or chance. To the contrary, the split reflects a fundamental difference of approach, which could not fail to produce different outcomes on similar or identical facts.

The circuit decisions aligned with the decision below, which take a broad view of general jurisdiction, regard their task as "balanc[ing] the facts of each case" between the "bookends" created by this Court, without a "formula," "precise checklist or . . . definitive litany of factors" to guide them. Pet. App. 12a, 14a n.3. With no principled basis for giving certain contacts greater significance than others, these courts then set out to "[n]avigat[e] the territory between *Perkins* and *Helicopteros*." Pet. App. 12a. Minimum contacts sufficient for general jurisdiction exist when there is a sufficient "confluence of . . . physical, economic and political presence." Pet. App. 17a.

The longstanding, and more traditional, approach looks not merely to the *quantity* of contacts with the forum, but draws *qualitative* distinctions depending on the nature of the contacts at issue. These qualitative distinctions are informed by this Court's decision in *Perkins*, in which headquarters-activities of a corporation exiled during World War II from the Philippines to Ohio were found a sufficient basis for general jurisdiction. These activities, and not simply the sale and marketing of products, were deemed the sort of "general business" presence adequate to support jurisdiction over

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furniture totaling $625,000 over two years); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005) (sales of paint through company-owned stores; no discussion of number of stores or amount of sales).

claims unrelated to the forum. *Helicopteros*, 466 U.S. at 415. The inquiry is whether corporate activities in the forum "sum to the general business presence found to exist in *Perkins*." *Bearry*, 818 F.2d at 375.

Of course, the notion of "qualitative" rather than merely "quantitative" distinctions antedates *Perkins*. *Int'l Shoe*, 326 U.S. at 319. Indeed, it traces back at least to the series of cases from this Court, decided in the first years of the twentieth century, which are discussed in the Petition, at 10-11, but never mentioned in the Opposition to Certiorari. *See People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 85-87 (1918); *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1914); *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533 (1907); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 20-22 (1907). At that time the Court made clear that business activities limited to sales and solicitation in the forum will not support jurisdiction over claims unrelated to those activities.[3]

Courts taking this approach include the First Circuit, which relies on a qualitative distinction between contacts akin to those present in *Perkins*, and those which exist when a company merely sells and promotes its products in the forum. In *Glater*, 744 F.2d at 216-217, the court first discussed the facts of *Perkins*, and then noted the reasoning of its own prior decision in *Seymour*, 423 F.2d 584, where it had "expressly distinguished *Perkins*" and concluded that where "defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction." 744 F.2d at 217 (citing *Seymour*, 423 F.2d at 587). The court in *Glater* then applied similar reasoning to deny general jurisdiction where sales representatives marketed to doctors, pharmacies

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[3] These early twentieth century cases have played an important role in the analysis of some appellate courts which distinguish between sales-related and general business contacts. *See, e.g., Nichols*, 991 F.2d at 1199-1200 (citing *People's Tobacco* and *Green*); *Wainscott v. St. Louis-San Francisco Ry. Co.*, 351 N.E.2d 466, 471, 474 (Ohio 1976) (same).

and hospitals, and sales were made through a network of in-state distributors. *Id.*

The Fourth Circuit, as reflected in *Nichols*, takes the same approach. The court there noted that the availability of specific jurisdiction meant that "broad constructions of general jurisdiction should be generally disfavored." 991 F.2d at 1200. Referencing its own decision in *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971), the court asked whether "advertising and solicitation activities constitute the type of continuous corporate operation within a forum state that justifies general jurisdiction." 991 F.2d at 1199. The court ultimately found its decision "controlled by *Ratliff's* rule that [such] activities alone do not constitute the 'minimum contacts' required for general jurisdiction." *Id.* at 1200.

Similarly, in *Bearry*, the Fifth Circuit quoted and expressly rejected the trial court's reasoning that the injection of "an enormous stream of commerce into the forum" – there in the form of product sales exceeding $300 million over five years – was sufficient to support general jurisdiction. "We disagree with the district court's conclusion that the 'stream of commerce' will support a finding of general jurisdiction." 818 F.2d at 375. Many other courts have predicated denials of general jurisdiction on similar qualitative reasoning, by which sales-related activities standing alone are so unlike the activities present in *Perkins* as to be categorically insufficient.[4]

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[4] *See, e.g., Harlow v. Children's Hosp.*, 432 F.3d 50, 64-65 (1st Cir. 2005) (inquiring "whether defendant's contacts with forum state constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*," and holding that "deriv[ing] substantial and constant revenue" from the forum does not suffice); *Associated Transp Line, Inc. v. Productos Fitosanitarios Proficol El Carmen S.A.*, 197 F.3d 1070, 1075 (11th Cir. 1999)("General jurisdiction has been found lacking even where a company had employees, agencies and salespeople regularly in the forum; . . . and derived more than 26% of its income from the forum."); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (citing *Perkins* for the proposition that "contacts of a more extensive quality and nature are required" for the

Respondent offers two objections to framing the Question Presented in terms of the sufficiency of "sales-related activities" to support general jurisdiction. First, Respondent argues that minimum contacts were established in this case on the basis of activities that were not sales-related. Second, Respondent further argues that the phrase is so vague that it would merely lead to further litigation as lower courts debate its meaning. *See* Opp. at 16-18. Both contentions are wrong.

The contacts at issue in this case, with one exception, are directly related to Petitioner's local sales. Petitioner obtained a business license that allows it to make sales, hires a sales force of several dozen to make the sales, leases an office to provide workspace for six or seven of its sales representatives, hires a warehouse to store products being sold locally, advertises to compete for sales against rival manufacturers, and has supported political activities in an attempt to prevent its advertising from being banned. *See* Pet. at 3. Only its medical research grant to the University of Washington – which the district court below found too inconsequential to mention (*see* Pet. App. 33a-37a) – is not directly related to local sales. It is implausible in the extreme to suppose that such a grant to support research in

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assertion of general jurisdiction, and finding that 12.9% of nationwide revenue and advertising in the forum does not connote a "general presence in the state"); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1994) ("*Perkins'* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its unusual facts," and "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action."); *Price & Sons v. Second Judicial Dist. Ct.*, 831 P.2d 600, 601 (Nev. 1992) ("Sales and marketing efforts in the forum by a foreign corporation, without more, are insufficient to establish . . . the high level of contact . . . . necessary [for] general jurisdiction."); *Fisher Governor Co. v. Superior Ct.*, 347 P.2d 1, 3 (Cal. 1959) (Traynor, J.) (after discussing *Perkins*, court held that "more contacts are required for the assumption of [general] jurisdiction than sales and sales promotion within the state").

the forum could be the critical contact making general jurisdiction sustainable.[5]

Nor should the Petition be denied on the ground that "sales-related activities," a phrase Petitioner used in its "Question Presented," are difficult to define. While admittedly the activities of any business are not susceptible to division into hermetically-sealed categories having no connection to each other, the category of activities directly related to the sale and marketing of products has been seen as a coherent one by many courts, including this one. Indeed Respondent answers his own criticism, when he aptly defines "sales-related contacts" as including "a physical salesroom or sales office, . . . advertising, a license to do business in the state, [a] number of employees and their sales-related duties, and the payment of sales taxes." Opp. at 9.

II. The Question Presented Was Thoroughly Aired In The Court Below

Respondent argues initially that "the Question Presented was neither raised nor decided below." Opp. at 6; *accord id.* at 1, 6-8, 19. While this Court has never suggested that the precise formulation of the Question Presented must be asserted or decided below in order for the issue to be preserved, Respondent's assertion, in any event, is wholly contrary to the facts. Both the Ninth Circuit's decision and Petitioner's brief before that court discussed at length whether Petitioner's activities created sufficient "minimum contacts" to permit the exercise of general jurisdiction. The focus of both the decision and the argument below was on the jurisdictional significance of Petitioner's sales in the forum state and the local activities Petitioner undertook to generate those sales. *See* Pet. App. 10a-17a; Appellant's Br. at 1-2, 11, 13-19.

Petitioner argued below, as it does before this Court, that "[n]either Reynolds' product sales in the State of

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[5] Apparently, Respondent also placed no importance on the medical research grant, since there was no mention of it in Respondent's merits brief on appeal. *See* Appellee's Br. at 7, 21-23.

Washington (while significant in volume), nor Reynolds' limited activities in the nature of local sales support, constitute the sort of presence that warrants the draconian imposition of *general* jurisdiction ...." *Id.* at 13-14. Indeed, though the wording is different, the "Question Presented" in the Petition for Writ of Certiorari is substantively identical to "Statement of the Issues" number 1 of Petitioner's Ninth Circuit Brief, which asks:

> 1. Whether a non-resident corporation, which is not headquartered or incorporated in the State of Washington, that conducts limited activities in the State to support its local product sales (similar in kind to its activities in every other state) is subject to general jurisdiction in Washington to adjudicate a claim that (1) does not involve any of the corporation's sales and activities in the State of Washington; and (2) arises from the marketing or consumption of products in the Republic of the Philippines.

Appellant's Br. at 1-2.

III. The Need For Review By This Court Is Compelling

It is clear that courts in this country are heading down two divergent paths when faced with the sufficiency of minimum contacts to support general jurisdiction. This is an important issue (as Respondent does not dispute), and this case presents an excellent opportunity for this Court to provide needed clarification.

Because the law of general jurisdiction is unclear, businesses that sell products in numerous jurisdictions cannot predict where they may properly be subject to suit, notwithstanding this Court's direction that the legal system should afford "a degree of predictability." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Pet. at 19-20. Likewise, because the law is unclear, there is frequent litigation over jurisdictional issues, notwithstanding this Court's recognition that such litigation is "essentially a

waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Pet. at 23-25.

Insofar as the approach taken by some courts has led to an improperly expansive exercise of general jurisdiction, the result is to encourage forum shopping, notwithstanding substantial reasons to foreclose litigation in fora that lack any connection to the subject matter of the lawsuit. Pet. at 20-21. Likewise, the unduly expansive exercise of general jurisdiction is sufficiently offensive from the perspective of many foreign legal systems that it has had a significant adverse impact on foreign trade relations. *Id.* at 21-22.

Because most state long arm statutes extend to the full limit of the due process clause, enforcement of a proper standard is critical to the allocation of judicial power between various state and federal courts. The issue thus raises substantial federalism concerns, as recognized in this Court's admonition that the States, through their courts, "not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.*, 444 U.S. at 292. Pet. at 22-23.

This case affords an especially appropriate vehicle for clarifying general jurisdiction. Respondent alludes to hypothetical fact questions that may arise in cases that also implicate specific jurisdiction (Opp. at 17), but this case raises no such issues. Respondent's claim matured during the 65 years that he lived in the Philippines, *id.*, and he concedes that his claim lacks any connection to the eight days that he lived in Washington before filing suit, or to any of Reynolds' activities in Washington. Pet. App. 7a. Thus, this case squarely (and solely) presents a question of general jurisdiction: that is, whether Reynolds' activities in Washington support jurisdiction in that State to adjudicate a claim that arose and matured in the Philippines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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